

Conference at the Antitrust Section of the
American Bar Association

Brussels, September 23, 1963

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on the

JURIDICAL ASPECTS OF COMMON MARKET

ANTITRUST ENFORCEMENT

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In a way, an antitrust policy in the Common Market has too many supporters. The difficulty is that each of them is prepared to support a different kind of regulation protecting or promoting his own interests.

This difficulty is considerably aggravated by the fact that such a regulation must be formulated and applied in a Community composed of six separate states whose economic systems and legal structures still differ. To undertake a common economic action the Member States had to establish a proper legal framework; they created new institutions and a new mechanism which had to be linked with the competence and structure of the Member States. It is this complex legal framework which predetermines the possibilities as well as the limits of this common action.

It may therefore be useful to recall some essential features of the Community legal structure as they may be deduced from the provisions of the Treaties and regulations and from the case law. I shall draw the examples primarily but not exclusively from the antitrust field, without examining the substantive law which shall be discussed to-morrow. I intend to consider first the question of law applicable within the Community; and then the judicial protection of parties concerned.

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I.- THE LAW APPLICABLE IN THE COMMUNITY

The law applicable within the Community - a notion which is to include not only legislative acts but all acts of competent public authorities creating rights and duties - encompasses both national and Community laws.

I. NATIONAL LAWS

Significantly enough the Treaties establishing the Communities do not impose obligations on the Member States only. They also lay down common rules binding on individuals and authorize the Community institutions to pass the Law in specific instances. The autonomous existence of a Community law is the outstanding legal feature of the Communities.

Its field of application is however strictly limited. Far from applying the Community law to the entire national economy of the Member States, the specific Treaty provisions provide for its application within precisely defined sectors. Matters which are outside the field of application of the Community law remain to be governed exclusively by national laws. This raises two important problems for the relationship of Community law and national laws.

1. First, taking the Treaty provisions as a starting point, the field of application of the Community law must be determined.

In the antitrust field those restrictive practices are to be determined which the Treaties do not cover - as for example practices having no effect on the Common Market and which, therefore, remain exclusively subject to national law. The delimitation of the field of application of the Community law depends on an interpretation of the Treaties. The Court of Justice, ultimately competent to decide thereon according to the E.E.C. Treaty, has not yet had an opportunity to rule on this matter in the antitrust field.

2. Secondly, within the field of application of the Community law, the question is to be examined if and to what extent national law is also applicable. The advocates of an exclusive application of the Community law are confronted by no less vehement advocates pleading for a concurrent application of the Community and of the national laws. This is by no means merely a theoretical question. In its judgement of May 9, 1963, for example, the Court of Appeal of Amiens stated that "since the absence of prohibition in whatever law does not preclude a prohibition pronounced by another law, the fact that this exclusive dealership agreement might not be prohibited by Community legislation would not be sufficient to justify an act (refusal to sell) to be prosecuted by French criminal law". Should it therefore be concluded that to remain legal a restrictive practice, as envisaged by the Treaty, must comply not only with the Community law but with the national law as well ?

In the absence of an explicit Treaty provision, it is generally up to the Court of Justice by interpreting the Treaty provisions to determine the proper relation of the Community law with the national law. According to the explicit provision of the E.E.C. Treaty, Art. 87 § 2 e), the Council of Ministers, acting on a proposal of the Commission may, however, define this relationship in the antitrust field - a power which they have not yet exercised so far.

II. COMMUNITY LAW

The Treaties refer the solution of this very delicate matter ultimately to the Council and the Commission. This reference calls for a closer examination of the Community law, especially as to its sources, its direct application and enforcement.

A. SOURCES

A distinction between the regulations and mere individual enforcement measures may facilitate the examination of the sources of the Community law.

1. Regulations

The Treaties themselves state the basic rules and principles. Thus in the antitrust field, Arts. 65 and 66 of the European Coal and Steel Community Treaty, and Arts. 85 to 90 of the E.E.C. Treaty are of primary concern. Drafting the Treaties it was necessary, and also possible, to agree on basic common principles which could not be changed without a preceeding Treaty revision. It might however have been unrealistic to provide a detailed agreement on implementation which would have hampered, if not prevented, a possible adaptation of the Community law to economic realities which could not have been foreseen at that time. For this reason regulations implementing the fundamental rules stated in the Treaties may have to be issued.

This mechanism reveals a particular subtlety and flexibility in the anti-trust field. The E.C.S.C. Treaty which regulates a limited sector of economy whose industrial structure is well known, contains already in its Arts. 65 and 66 very detailed rules; there was therefore little need for specific regulatory powers of the High Authority to be exercised in consultation with the Council. But to adjust in the light of experience the rules laid down in the Treaty, there is no other way available than a Treaty revision. And this procedure undertaken for several years proves to be slow and difficult. Drawing from the lesson taught by the operation of the E.C.S.C., the E.E.C. Treaty, which regulates all sectors of national economy except coal and steel, merely prescribes in

Arts. 85, 86, 89 and 90 the fundamental rules, and furthermore provides for a subtle procedure for formulating implementing rules. At the beginning, national legislations are, according to Art. 88, to assure the application of its antitrust provision. This leads however to disparities incompatible with a properly functioning Common Market. To prevent such an undesirable development the common institutions themselves may, according to Art. 87, pass the necessary Community law. The competence conferred on the common institutions is extremely large : it comprises all measures useful for the application of rules embodied in Arts. 85 and 86, including the institution of fines and penalties; division of function between the Commission and the Court of Justice; and even, as we have already seen, the definition of relation between national and Community laws .

Exercising these powers, the Council, acting on the proposal of the Commission and after consultation of the Economic and Social Committee and of the Parliament, issued the Regulation nr. 17, which entered into force on March 13, 1962. Most likely the Council will be asked to take other measures in the future.

The Council empowered the Commission, in accordance with Art. 155 of the Treaty, to issue regulations to set the means of applying Regulation nr. 17. Accordingly, the Commission issued Regulations nr. 27 concerning the forms of application and notification, and nr 99/63 concerning the hearing of interested parties.

The preceeding reports as well as the subsequent report by Mr. WOHLFARTH, make it unnecessary for me to explain the respective parts the Commission, the Parliament and the Council play in elaborating the antitrust regulations to implement Arts. 85 and 86. Instead I would like to limit myself to three general remarks on the legislative system of the Community as instituted by the E.E.C. Treaty. First, this system which avoids the slow and politically delicate procedure of a Treaty

revision, facilitates a constant adjustment of the rules to economic realities, a necessity vividly illustrated by the development of the American antitrust legislation. Secondly, this flexible system is a complex one ; of this the practitioners become aware when considering the need to combine the rules of the Treaty, the regulations of the Council and of the Commission, and the national law, and when contemplating the time necessary for elaborating the regulations. This system endeavours to respect the complexity of European realities, and to assure at each step an acceptable balance in the participation of national Governments, of popular representation, and of the Commission, the actual driving force promoting the Community interests. This leads me to my third remark. The E.E.C. Treaty entrusts very large regulatory powers over a vast field of economic activities either to the Council, acting by a majority vote on a proposal of the Commission and after the consultation of the Parliament; or to the Commission itself. Doing so, the E.E.C. Treaty is - contrary to what is sometimes maintained - no less bold in its move to build a European Community than the E.C.S.C. Treaty.

2. Individual enforcement measures

This last remark is well confirmed when the individual enforcement measures are examined. These measures are to be understood as acts which, applying the provisions of the Treaties and Regulations, determine the rights and obligations of a Member State or of an individual in a specific, concrete situation. In the antitrust field, such measures are numerous and of great importance for the enterprises concerned. As examples may be cited:

orders requesting information or carrying out verification; negative clearances stating that according to information known the cartel is not prohibited by Art. 85; decisions which grant or refuse a declaration of exemption as provided by Art. 85 § 3; the cease and desist orders which oblige enterprises to discontinue practices contrary to the applicable rules; deconcentration orders as provided by Art. 66 of the E.C.S.C. Treaty; recommendations to make certain restrictive practices compatible with the Community law.

Such measures affect directly enterprises under the jurisdiction of the Member States; they may also affect indirectly but nonetheless strongly the structure or development of national economies. For these two reasons the Member States have a great interest in such measures. It was nevertheless decided to leave the execution of these measures to the European Executives, as the only authorities capable to assure an impartial application of the law in the interest of the Common Market. Under the E.C.S.C., the High Authority may, in accordance with explicit Treaty provisions, take individual measures, subject of course to a control by the Court of Justice. The E.E.C. Treaty did not settle the question of competence in this matter; it was, subsequently resolved by the Regulation nr. 17. After prolonged debates it was agreed that the Commission should take all necessary individual measures. The Member States took however some precautions. Thus the Council has up to now considered that the definition of categories of practices to be exempted according to art. 85 § 3 from the prohibition of Art. 85 § 1 requires a Council regulation.

While the Commission is exclusively competent to apply Art. 85 § 3, national authorities may yet apply Arts. 85 § 1 and 86 until the Commission takes action in this matter, be it upon request or ex officio. (Judgements of the Court of Appeal, Paris, Jan. 26, 1963 - Société U.N.E.F. c. Ets Consten - ; Court of Appeal of Amiens, May 9, 1963 - Nicolas c. Brandt - ; L.G. Munich, Feb. 25, 1963 ; O.L.G. Munich, May 30, 1963 ; Court of Appeal, Berlin, May 4, 1963 ; ordinance of the President of Tribunal de Commerce, Antwerp, Oct. 25, 1962). Moreover before taking final decisions the Commission must consult the Consultative Committee on Cartels and Monopolies, composed of representatives of national authorities. Finally the Member States assist the Commission in its measures taken with regard to enquiries or investigation, Regulation n° 17 Arts. 11, 12 and 14.

Thus throughout the elaboration of the Community law, there is a close link between national authorities and the Community institutions. This may be explained by the fact that the Community law is directly applicable within the territories of the Member States.

B. DIRECT APPLICATION

The provisions of the Community law are binding on and directly applicable to those they concern, be it a Member State or an individual.

In the continental legal system, the Treaties, once properly ratified and duly published, become the law of the State, and as such must be applied by national courts. The Court of Justice as well as national courts of all Member States have already applied this principle to some provisions of E.C.S.C. and E.E.C. Treaties. Of course, to become binding on a national court which lacks competence to rule on the disputes between Member States or between a Member State and a common institution, these provisions must cause direct effect on individuals. And this is a matter for a Treaty interpretation. Two

judgements of the Court of Justice interpreting the E.E.C. Treaty are specially pertinent in this regard. The first is the ruling of the Bosch case, April 6, 1962, which confirmed the view that the antitrust provisions are directly binding on individuals. The other of February 5, 1963, decided that the Treaty obligation of the Member States to abstain from raising custom barriers existing when the Treaty entered into force, conferred a right on individuals to invoke before a national court a violation of this obligation by a Member State. Therefore, far from comprising exclusively obligations of international law, the Treaties contain also some provisions individuals may directly invoke in relation to national law. The antitrust provisions fall in this category.

This is also true for some acts the common institutions may or must take according to the Treaties. Opinions, and recommendations as provided by the E.E.C. Treaty, have no binding force and need, therefore, not to be considered here. Directives and decisions addressed to Member States are binding on them. As to individuals, they are directly bound by regulations as well as by decisions addressed to them. Consequently in the antitrust field, regulations of the Council, of the Commission or of the High Authority, as well as the individual measures of execution mentioned previously, are binding on individuals in the same way as national law is. Several national courts have already recognised the direct application of regulations. In the antitrust field, I may cite the judgements of the Court of Appeal of Paris of January 26, and March 30, 1963, which stated as to the Regulation n° 17, that the Community law binds national courts in the same manner as national law does.

C. SANCTIONS

Being directly binding the Community law must be observed. A Community mechanism is instituted to prevent a violation of this law.

The Commission or a Member State may bring before the Court of Justice a failure of a Member State to observe its obligations prescribed by the Community law. If the Court of Justice finds such a violation, the defaulting Member State must meet its obligations. This procedure has already been used several times ; the defaulting Member States found in violation of its obligations took the measures necessary to comply with the judgement of the Court.

The observation of the obligations directly binding on individuals is assured by sanctions. Either Member States are obliged to provide for proper national sanctions ; or the Commission may impose on defaulting individuals fines or penalties as provided already in the regulations themselves. Thus in the antitrust field the Commission may, according to Regulation n° 17, impose fines up to U.S. \$ 100 to 5.000 for refusing to give information required or for giving false information ; \$ 1.000 to 1.000.000 for violating the provisions of Arts. 85 and 86. The Commission may also impose penalties of \$ 50 to 1.000 for each day of delay in complying with the obligations. The corresponding provisions of Art. 65 § 5 of the E.C.S.C. Treaty have actually been applied. The Community fines and penalties may be recovered by a procedure of forced execution which the Member States must automatically carry out.

II - THE PROTECTION OF RIGHTS

Viewing briefly the Community law, a complex and well armed law, you as practitioners will of course raise the question as to the means and remedies available for the protection of your clients' rights. I may assure you that there are such means and remedies. Moreover they are complex and the application of the antitrust provisions of the Community law is intricate so that the antitrust field may, like

in the U.S.A., a very paradise for lawyers - if one accepts this strange notion of paradise.

A. JUDICIAL PROTECTION OF THE MEMBER STATES

Before examining the means of protection available to individuals, it should be mentioned that any Member State may appeal before the Court of Justice any binding act of the Council, the Commission or of the High Authority as well as the failure of these institutions to act when the Community law prescribes action. These fundamental provisions are a guarantee to any Member State that the Court of Justice will assure the legality of any act of a Community institution.

B. PROTECTION OF INDIVIDUALS

Individuals also enjoy a legal protection. This protection is open to any individual, not necessarily a national of a Member State, who is able to prove his legal capacity and show adequate interest.

The protection of interests of individuals against measures which concern them directly and individually is already assured by the executive bodies during the preparation of the individual measures ; and afterwards by the courts.

1. Preparation of individual measures

Exercising its usual executive function, not unlike that of the Ministers of the Member States, the Commission or the High Authority may take, within the limits defined by the Treaties and regulations, measures which directly affect the interests of individuals. Ordering such measures these authorities seek to obtain the information necessary

and to acquaint themselves with the observations of the parties interested.

Within the antitrust field, the E.E.C. Regulation n° 17 provides for a preliminary hearing, the procedures for which the Commission recently determined by Regulation 99/63 of July 25 of this year. Before consulting the Consultative Committee, on a proposed decision, the Commission informs the interested parties of the charges it intends to make. These parties as well as third parties able to show sufficient interest, may present within a fixed period of time their written observations and avail themselves of all means of defense. Depending on the case, oral observations may be made and witnesses heard. Persons heard may be assisted by lawyers and other qualified persons. This hearing, which will soon be actually used for the first time, is a fundamental guarantee for the interested parties; indeed, the Commission may retain in its decision only those charges on which the addressee of the decision had a previous opportunity to express its observations.

This procedure, meant to clarify the issues involved, may assist the enterprises in their effort to adjust in time their practices and avoid so possible charges of the Commission. Anyhow, it predetermines the scope of the decision the Commission might take to prescribe such an adjustment.

2. JUDICIAL protection of individuals

It would however be too optimistic to assume that in all instances this procedure will lead the parties to accept without dispute the views of the Commission. On the other hand, individuals may well have an interest in invoking the Community law in litigations opposing either another individual or their Member State.. What kind of judicial protection do they enjoy ? The illuminating remarks made by President Donner in his speech enable me to shorten my observations on this point.

A distinction should be drawn between means which individuals may invoke before the Court of Justice and those before national courts.

a) Before the Court of Justice individuals may appeal within a two months period any decision which concerns them directly and individually. They may obtain its complete or partial annulment provided they are able to prove that the decision is contrary to the Community law. In case of appeals against pecuniary sanctions the Court of Justice may revise their amount imposed by an individual decision.

Individuals may however not appeal regulations of general application or decisions or directives addressed to a Member State, if they cannot prove that they are directly and individually concerned by these Community acts. These points were recently settled by the important judgements the Court rendered on December 14, 1962 and July 15, 1963.

There is however an important exception to these restrictions of the judicial protection of individuals : during a litigation pending before the Court of Justice, to which he is a party, an individual may always contest the validity of a provision of a regulation in order to prevent its application to him. In another judgement of December 14, 1962, the Court ruled that this remedy, which is merely an incidental means of limited effect, may not lead to direct appeal for annulment otherwise inadmissible.

Thus in the antitrust field of the E.E.C., individuals may not appeal the Regulations n° 17 or 27 and 99/63. They may however appeal decisions of the Commission which concern them directly and individually. To prevent the application of such an individual decision, they may claim that it is based on a regulation which is contrary to the Community law.

b) Before national courts, individuals may always invoke the provisions of the Community law. Since the Community law has the same force as national law, national courts must apply it under the same conditions.

This application of the Community law by national courts is however dangerous in so far as it may lead to its divergent interpretation. To avoid such danger and moreover preclude unnecessary procedural delays, all national courts may and courts of last instance must, according to the E.E.C. Treaty Art. 177, refer to the Court of Justice questions raised before them in a pending litigation which involve either an interpretation of the Community law or the validity of acts of Community institutions. In these instances, the Court of Justice does not replace national courts in judging the case on its merits ; it merely rules on the meaning of the Community law or on the validity of the Community acts, a ruling which is final, being subject to no further appeal. This peculiar mechanism, the application of which raises numerous questions, has been increasingly used. While clearly recognising the direct application of the provisions of the Community law, German and Italian supreme courts have shown a tendency to interpret themselves these provisions ; several Dutch courts on the other hand, referred such preliminary questions to the Court of Justice in accordance with Art. 177. In the antitrust field the ruling of the Bosch case was rendered by the Court following this procedure.

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These observations show how the formulation and the application of the antitrust provisions in the Common Market take place in the general legal framework of the European Communities.

This legal framework may appear weak to lawyers familiar with a federal system, experienced with the problems of conflict of laws. Thus there is no formal federal clause which would explicitly uphold the supremacy of the Community law over all provisions of national law. Equally missing is a full faith and credit clause, or a right of individuals and of Community institutions to bring before the Court of Justice any litigation which involves the Community law. The complex Community mechanism leads sometimes to a cumbersome and slow procedure. The shortcomings of the legal institutions merely reflect the present European realities. They show that the development towards a European unity has only just begun and that also in the legal field it requires more work, ^{more} mutual understanding and more experience. Merely eleven years passed since the first European Community was established in response to an appeal of my grand compatriote Mr. Robert SCHUMANN who recently died : a period no longer than that of the American Confederation of 1776. The first measures for the establishment of the Common Market were taken less than five years ago. The Member States are learning to show confidence towards the Community institutions and these are learning to deserve it. In joint action national and Community authorities will develop their co-operation and take further steps. The application of the antitrust provisions will provide, no doubt, an ample field for this co-operation.